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IN THE

Supreme Court of the United States

OTTO F. APEL, III, PHYLLIS FULLER, ROBERT STEVENS, STEVE STURGILL and WALTER R. HICKMAN, JR.,

Petitioners,

v.

GABE CANARY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether individual members of a school district's board of education are entitled to absolute legislative immunity in cases brought under 42 U.S.C. § 1983 for budgetary decisions voted upon by the school district board of education.

PARTIES TO THE PROCEEDING

Petitioners are Otto F. Apel, III, Phyllis Fuller, Robert B. Stevens, Steve Sturgill, and Walter R. Hickman, Jr.

Respondent is Gabriel Canary.

Petitioners Otto F. Apel, III, Phyllis Fuller, Robert B. Stevens, Steve Sturgill, and Walter R. Hickman, Jr. (collectively hereinafter "School Board Members") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 3, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 211 F.3d 324 (6th Cir. 2000). A copy of the opinion is included in the Appendix at Appendix A at 1a-18a. The opinion of the United States District Court for the Southern District of Ohio, Western Division, is unpublished and is reprinted in Appendix B at 19a-41a.

STATEMENT OF JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was entered on May 3, 2000. This Petition for a Writ of Certiorari was filed within ninety days of the opinion of the United States Court of Appeals for the Sixth Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 6 of Article I of the United States Constitution concerning absolute legislative immunity. Pertinent provisions of 42 U.S.C. § 1983 are also involved. The relevant portions are set forth in Appendix C at 42a.

STATEMENT OF CASE

Respondent brought this action alleging a violation of his civil rights and handicap discrimination against the school superintendent, the school board and the individual school board

members/petitioners. All defendants, including petitioners, moved for summary judgment which was denied by the District Court. The petitioners claimed absolute legislative immunity under the this Court's decision in *Bogan v. Scott-Harris,* 523 U.S. 44 (1998). The District Court denied petitioners' motion for summary judgment ruling, in part, that legislative immunity did not attach to the petitioners as school board members.

After a timely filed notice of appeal, the Sixth Circuit affirmed the District Court's judgment on May 3, 2000. The Sixth Circuit distinguished *Bogan v. Scott-Harris* while denying absolute legislative immunity for the petitioners.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding that the petitioners are not entitled to absolute legislative immunity, cannot be squared with this Court's holding in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). The Sixth Circuit impermissibly constrained the holding of *Bogan* by misdefining policymaking decisions as merely administrative, thus precluding the absolute legislative immunity otherwise deserved. The published decision of the Sixth Circuit deviates from this Court's rulings and undermines the precedential value of *Bogan*. The need for this Court to restate its commitment to absolute legislative immunity for local, part-time citizen legislators is acute; otherwise *Bogan* and its holding will be eviscerated by the Sixth Circuit and narrowly defined into nonexistence.

I. The Decision Of The Sixth Circuit Conflicts With The Decision Of The Supreme Court In *Bogan v. Scott-Harris*

In *Bogan*, this Court extended the venerable tradition of absolute legislative immunity to local legislators, making them absolutely immune from suit under § 1983 for their legislative

activities. *Id.* at 49. This Court reasoned that the rationale for according absolute immunity to federal, state and regional legislators applied with equal force to local legislators because the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. *Id.* at 52. The Court went on to note that the time and energy required to defend against a law suit is of particular concern at the local level, where the part-time citizen-legislator remains commonplace. *Id.* This Court recognized that the threat of liability may significantly deter service in local government where prestige and pecuniary rewards would pale in comparison to threat of civil liability. *Id.*

This Court found that the acts of voting for an ordinance in *Bogan* were quintessentially legislative acts entitling the actors to legislative immunity. That is exactly what has transpired in the instant case. The Sixth Circuit's decision cannot be reconciled with *Bogan*. In both *Bogan* and the instant case, the local legislative body made discretionary, policymaking decisions implicating the budgetary priorities of the governmental entity. Moreover, the Petitioners' actions involved the termination of an entire category of positions, that is, assistant principals. The elimination of the assistant principal positions has prospective implications that reach well beyond the particular respondent in this matter. As a result of the severe budgetary crisis facing the Petitioners' school district, they eliminated the assistant principal position. It is undisputed that there were no assistant principals in the school district for the school year immediately following the non-renewal of respondent's administrative contract.

As this Court noted in *Bogan*, the immunity attaches to all acts taken in the sphere of legitimate legislative activity. This Court was very expansive in finding what might be included in the sphere of legislative activity. In *Bogan*, an entire city

department was eliminated and that was held to be a legislative act entitled to immunity despite the fact that only one person was employed by that department. Certainly, on the face of it, such an act might appear to be directed at the one individual. However, this Court did not narrowly define what is legislative activity so as to preclude the legislative immunity in *Bogan*.

The Sixth Circuit's attempt to narrow *Bogan*'s reach should not be countenanced. Whether or not individual school board members are entitled to absolute legislative immunity for enacting discretionary policy making measures is critically important. With the national concern surrounding the state of education today, the importance of completely defining the parameters of legislative immunity is clearly needed. With the influx of civil rights suits in the educational setting, the question presented needs to be answered clearly and without ambiguity for the district courts and the courts of appeals that will undoubtedly be hearing these similar matters. This is especially so in Ohio given the current disarray of educational funding. As more and more school districts encounter financial difficulties, the reduction of administrative costs and salaries will often be an area necessarily addressed by the local school boards. To deny school board members legislative immunity for these necessary decisions would be adding insult to injury.

II. The Decision Of The Sixth Circuit Has A Chilling Effect On Potential School Board Members And A Debilitating Effect On School Districts.

The courts below ignored the concerns outlined in *Bogan* with respect to the interests of individual citizen-legislators. This Court properly noted that the time and energy required to defend against a lawsuit and the threat of liability may serve as deterrents to worthy individuals engaging in public service on local legislative bodies, such as school boards. If potential school

board members are not given absolute legislative immunity for discretionary, policy making decisions then they may choose not to serve. This would severely damage school districts since they would not attract qualified individuals otherwise willing to serve their districts. The threat of civil liability is enough to drive away individuals from a part-time legislative body such as a school board. The prestige accorded school board members and the minor pecuniary remunerations would be insufficient to attract the best and brightest individuals a community has to offer. That would be an unnecessary and undesirable result from the Sixth Circuit's misreading of *Bogan*.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED MAY 3, 2000

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98-4218

GABE CANARY,

Plaintiff-Appellee,

v.

H. GARRY OSBORN, BOARD OF EDUCATION, PORTSMOUTH CITY SCHOOL DISTRICT,

DEFENDANTS,

OTTO F. APEL, III, PHYLLIS FULLER, ROBERT STEVENS, STEVE STURGILL, WALTER R. HICKMAN, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. Nos. 95-00944; 96-00253 — Susan J. Dlott, District Judge.

Argued: March 8, 2000

Decided and Filed: May 3, 2000

Appendix A

Before: WELLFORD, SILER, and GILMAN, Circuit Judges.

* * *

OPINION

RONALD LEE GILMAN, Circuit Judge. The sole issue in this interlocutory appeal is whether the individual members of the Portsmouth (Ohio) City School District Board of Education are entitled to absolute legislative immunity under *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), for their role in voting against the renewal of Gabe Canary's contract as an assistant principal. Among other grounds, Canary brought suit under 42 U.S.C. § 1983 on the basis that the defendants violated his constitutional rights when they demoted him in alleged retaliation for his "blowing the whistle" on a suspected cheating scheme involving student achievement tests. The defendants appeal the district court's denial of their motion for summary judgment, which was based on an assertion of absolute legislative immunity. For the reasons set forth below, we **AFFIRM** the judgment of the district court and **REMAND** the case for further proceedings not inconsistent with this opinion.

I. BACKGROUND

A. Factual background

Canary was hired by the Board in 1985 to serve as an assistant principal. He worked at the McKinley Middle School and at the Portsmouth East High School during the

1992-1993 and 1993-1994 school years, respectively. In addition to McKinley and Portsmouth East, the School District includes the Harding and Wilson elementary schools. At all times relevant to this case, the Board consisted of Otto F. Apel, III, Phyllis Fuller, Walter R. Hickman, Jr., Robert Stevens, and Steve Sturgill. H. Garry Osborn served as the Superintendent of the School District.

In November of 1992, while working as the Assistant Principal of McKinley, Canary attended a district-wide meeting of various Portsmouth administrators. Among those in attendance were Wanda Kinker, the Principal of Harding, and Mike Welton, who at the time was the Principal of McKinley and Canary's immediate superior. During this meeting, the administrators discussed ideas for increasing the students' achievement test scores. In an affidavit filed with the district court, Canary asserts that the following exchange took place:

> Kinker stated that she would be coming to the schools in the district and [would be] exhibiting actual tests and answers to the principals for review. She said principals would be allowed to copy the questions by hand, and then could go over them with teachers in their [respective] schools. I immediately objected to this because it was cheating and I was aware of a case in North Carolina where teachers had their certificates taken away for doing the same thing. Kinker said she had been doing this for years and that if anyone objected, she had gotten rid of them.

> . . . Welton was asked if he would allow this to be done at McKinley . . . . He stated that I was in charge of testing and that we would not allow cheating at McKinley.

Despite Canary's and Welton's stated objections at the November 1992 meeting, Canary came to believe that "actual tests had been shown to and hand-copied by teachers at Wilson . . . ." As a result, Canary wrote to E. Roger Trent, then Director of the Division of Educational Services at the Ohio Department of Education. In his letter, Canary recounted part of the November 1992 meeting and requested an investigation into the matter. Specifically, he wrote as follows:

> It is common knowledge here that the cheating was directed from the superintendent aids [sic], and they indicated that they had been told to do so.
>
> . . .
>
> I feel certain that an investigation will reveal a conspiracy to cheat that includes "top personnel" and possibly board members.
>
> I feel certain that a cover-up is now taking place.
>
> I feel certain that plans are being made to retaliate against myself and Mr. Welton based on statements . . . made to me and others.

Appendix A

As a result of Canary's letter, Trent notified Osborn that his office had received allegations of possible test security violations. He requested that Osborn conduct an investigation and issue a written report of any action taken in response. Osborn complied with Trent's initial request by engaging Richard Ross, the School District's attorney, to conduct an investigation into the matter. Ross interviewed various administrators, including Canary, in connection with his probe. During Canary's interview, Ross allegedly accused Canary of "being insubordinate for not going along with the testing procedure . . . ."

Sometime between April and July of 1993, Ross submitted a written report to Trent. After reviewing Ross's assessment, Trent communicated his conclusions to the School District, via Ross, in a letter dated July 23, 1993. He found that "the district was NOT in compliance with one of the fundamental provisions of Rule 3301-12-06 [of the Administrative Code]: the requirement that each district establish written procedures protecting the security of test materials while they are in school." (Emphasis in original.) Specifically with respect to the practice objected to by Canary and Welton, Trent wrote as follows:

> Although [Rule 3301-12-06] contains no specific provision limiting the preview of test materials by teachers, both Section 3319.151 of the Revised Code and this rule clearly prohibit the use of materials for the purpose of improving a student's score. Encouraging teachers to review the actual tests for the purpose of "improving test-taking techniques[ ]" . . . is an activity that, in certain

> high stakes situations, might result in someone's using the information to improve students' scores.
>
> We expect Portsmouth City Schools to discontinue immediately the practice of encouraging or allowing teachers to preview the tests currently being administered by the district (or commercially-prepared alternative forms of such tests) for the purpose of "improving test-taking techniques."

Trent ultimately concluded, however, that "there is no concrete evidence that any one [sic] used the test materials to reveal any specific test question to a student or to help any student cheat . . . ."

In a separate but related dispute, another employee of the School District, Michael Osborne, sued the Board in 1993 "relat[ing] to a forced vacation following an allegation that [he] had disseminated actual achievement test questions to the faculty at Wilson . . . ." (Michael Osborne, a teacher at the Wilson Elementary School, is not to be confused with H. Garry Osborn, the Superintendent of the School District.) William K. Shaw, Jr. served as Michael Osborne's attorney. During the course of Shaw's representation, he requested and received from the Ohio Department of Education an unredacted copy of Canary's letter to Trent. Armed with Canary's letter, Shaw met with Osborn and Ross in June of 1993. During that meeting, Shaw complained that his client, Michael Osborne, was "being blamed and disciplined for allegedly creating a teaching controversy" while Canary, who Shaw characterized as "the driving force behind the State's

investigation," had not been "punished in any form." According to Shaw, Ross responded to the complaint by stating that he and Osborn "would take care of Canary." Shaw also contends that "Osborn nodded as if in agreement . . . ."

Shortly after Shaw's meeting with Osborn and Ross, Osborn asked Canary about the substance of his letter to Trent. According to Canary, Osborn "angrily confronted" him and asked "[W]hat is this horse[—] letter[?]" Osborn testified during his deposition that, after learning from Shaw that Canary had written the letter to Trent, he shared that information with members of the Board: "I would assume that I would have had a discussion with them about it or sent them a copy [of the letter]. . . . You know, I can't recall any specific conversation, but I'm assuming that I would have discussed it with them, and shared a copy with them and counsel." A copy of the letter was also distributed by Osborn to other administrators. In July of 1993, Canary was transferred from McKinley to Portsmouth East.

On March 10, 1994, the Board held one of its regular meetings. Apel, Fuller, Hickman, Stevens, and Sturgill were all in attendance. The minutes reflect that, after approximately thirty-five minutes of discussing several routine matters, the Board went into executive session "to discuss the employment of public employees." In addition to the Board, other individuals were allowed to attend the executive session, including Osborn and Ross. The closed meeting lasted from 6:40 p.m. until 7:43 p.m. During that time, various "outsiders" were permitted into the executive session. For example, Shaw and Michael Osborne entered at 6:50 p.m. and exited at 7:13 p.m., and Welton attended from

7:22 p.m. until 7:41 p.m. Canary was not present for any part of either the regular meeting or the executive session.

The results of the Board's closed meeting are set forth in its minutes under the title "personnel actions," and are further divided into "resignations," "change[s] in status," and "appointment[s]/reappointment[s]." As for the first of these categories, the minutes reflect that the Board accepted the resignations of a teacher/tutor and of a custodian. The third category lists eight principals and assistant principals, including Kinker, who were appointed or reappointed, along with their respective contract start dates.

Five individuals are listed under the "change[s] in status" category. The minutes indicate that, after the Board changed the title of one of its substitute teachers, it voted to not renew the contracts of four certified administrators — Canary, Kathleen Moore, Michael Osborne, and Welton. Each name is listed separately, followed by their title as of the date of the meeting, a summary of the expiring contract, and the position to which they were newly appointed. For Canary, Michael Osborne, and Welton, that new position was a demotion to "Teacher, Continuing Contract." The following explanation is provided in the minutes for each of these "change[s] in status":

> This action reflects the adverse financial status being faced by the district. As a result of the financial situation, it will be necessary to carefully analyze the cost efficiency of other district positions and possibly eliminate some positions which are important; but not critical to the

> operation of the district. The possibility of such action being taken in the future was communicated to all administrators in March of 1991.

All of these decisions were made upon Osborn's recommendation, and were unanimously approved by the Board. During the remainder of the meeting, the Board discussed various financial reports and other miscellaneous matters. By letter dated March 11, 1994, Osborn informed Canary of the Board's decision, and provided the following explanation:

> The action was taken as a reaction to the adverse financial status being faced by the district. Difficult situations often result in the need to take unpleasant actions. We are sad for the discomfort and displeasure the action may cause you. The best is wished for your tenure as a district teacher.

Although not entirely clear from the record, the Board apparently created two new "student facilitator" positions for the School District sometime after March of 1994. Osborn testified during his deposition that a student facilitator, among other things, "helps with discipline, proficiency, testing, guidance of young people, [and] counseling." At least one of the student facilitators was allocated to Portsmouth East, where Joe Knapp served as the Principal. During the summer of 1994, Canary, at the urging of Knapp, applied for that position. He was not appointed. At the end of the summer, Canary was informed that he would be assigned to teach at McKinley for the 1994-1995 school year. It was

then that he learned that Jim Smith, another employee within the School District, had been chosen to be the new student facilitator at Portsmouth East.

B. Procedural history

Canary filed suit against Apel, Fuller, Hickman, Osborn, Stevens, Sturgill, and the Board. He sued the members of the Board in their individual and official capacities. In his complaint, Canary alleged that the defendants "infringed upón [his] right to speak out about matters of public concern by retaliating against him and demoting him because he refused to engage in the cheating scheme . . . and because he reported the activity to the State of Ohio."

The defendants filed a motion for summary judgment on May 15, 1998. Among other things, they argued that Apel, Fuller, Hickman, Stevens, and Sturgill were not liable in their individual capacities because they were entitled to absolute legislative immunity as established by *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). The district court, by order dated September 30, 1998, denied the defendants' motion. In its order, the district court concluded that the members of the Board were not entitled to absolute legislative immunity because "in not renewing particular employees' contracts while renewing others, the Board was making individual employment decisions."

In this appeal, the defendants do not contest the other rulings contained in the district court's order. Rather, they take issue with the district court's interpretation of *Bogan* and argue that *Bogan* is indistinguishable from the present case.

Appendix A

II. ANALYSIS

A. Standard of review

We review de novo a district court's decision to grant or deny summary judgment. *See Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The judge is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial exists when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

B. The district court did not err when it held that the defendants were not entitled to absolute legislative immunity

"Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). The rationale supporting such absolute legislative immunity, which was written into our Constitution, *see* U.S. CONST. art. I, § 6, has been summarized as follows:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.

Tenney, 341 U.S. at 373 (citation and internal quotation marks omitted). It is the defendants' burden to establish the existence of absolute legislative immunity. *See Kamplain v. Curry County Bd. of Comm'rs*, 159 F.3d 1248, 1251 (10th Cir. 1998).

Recently, the Supreme Court extended this "venerable tradition" to *local* legislators, making them "absolutely immune from suit under § 1983 for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). It reasoned as follows:

> The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. And the threat of liability may significantly deter

> service in local government where prestige and pecuniary rewards may pale in comparison to the threat of civil liability.

Id. at 52 (citations omitted).

As previously noted, the defendants argued in support of their summary judgment motion that the members of the Board are entitled to such immunity because they were acting in a legislative manner when they voted to not renew Canary's contract. In response, Canary contends that the defendants' action "was simply an administrative employment decision." Because we agree with Canary's position as to the factual nature of the inquiry and whether the contested action was legislative in nature in this case, we need not address the question of whether a school board can ever be shielded by legislative immunity.

The disposition of the present case requires a close examination of *Bogan*. Janet Scott-Harris, the plaintiff in that case, was the Administrator of the Fall River (Massachusetts) Department of Health and Human Services (DHHS). During her tenure, she received a complaint that one of her temporary employees had made several racial and ethnic slurs about the employee's colleagues. Scott-Harris responded by preparing termination charges against the employee. The employee, however, was able to forestall termination by using her political connections with the Fall River City Council to obtain a hearing on the matter. As a result of the hearing, the employee agreed to be suspended without pay for sixty days. Daniel Bogan, the mayor of Fall River, eventually reduced the length of the suspension.

While the charges against the employee were pending, Bogan had prepared his annual city budget proposal. Anticipating a reduction in revenue, Bogan proposed freezing municipal employee salaries and eliminating 135 jobs. Included in his proposal was the elimination of the DHHS, of which Scott-Harris was the sole employee. The City Council Ordinance Committee, chaired by Marilyn Roderick, approved an ordinance eliminating the DHHS. After the city council adopted the ordinance, Bogan signed it into law.

Scott-Harris thereafter filed a § 1983 action against Fall River, Bogan, Roderick, and others, alleging that "the elimination of her position was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights in filing the complaint against [the employee]." *Bogan*, 523 U.S. at 47. The district court denied Bogan's and Roderick's motion to dismiss, which was based on an assertion of legislative immunity. On appeal, the First Circuit affirmed, holding that the challenged conduct was administrative, not legislative. *See Scott-Harris v. City of Fall River*, 134 F.3d 427 (1st 1997).

The Supreme Court reversed, holding that "local legislators are . . . absolutely immune from suit under § 1983 for their legislative activities." *Bogan*, 523 U.S. at 49. The Court made clear that the determination of whether an activity is "legislative" must be made without regard to the legislators' subjective intent. *See id.* at 54 ("[T]he [First Circuit] erroneously relied on [the officials'] subjective intent in resolving the logically prior question of whether their acts were legislative."); *see also Tenney*, 341 U.S. at 377 ("The claim of an unworthy purpose does not destroy the privilege."). In other words, "[w]hether an act is legislative

turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54. The proper inquiry, therefore, was "whether, stripped of all considerations of intent and motive, [the] actions were legislative." *Id.* at 55.

Applying those standards to the facts before it, the Supreme Court ruled that Bogan and Roderick were indeed entitled to legislative immunity: "Roderick's acts of voting for an ordinance were, in form, quintessentially legislative. . . . Bogan's introduction of a budget and signing into law an ordinance also were formally legislative, even though he was an executive official. . . . Bogan's actions were legislative because they were integral steps in the legislative process." *Id.* (citations omitted). The Court then looked beyond Roderick's and Bogan's "formal actions" to consider whether the ordinance at issue was legislative "in substance":

> We need not determine whether the formally legislative character of [Roderick's and Bogan's] actions is alone sufficient to entitle [them] to legislative immunity, because here the ordinance, in substance, *bore all the hallmarks of traditional legislation*. The ordinance reflected a discretionary, policymaking decision *implicating the budgetary priorities of the city and the services the city provides to its constituents*. Moreover, *it involved the termination of a position*, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office.

Id. at 55-56 (emphasis added).

Based on the above considerations, it becomes evident that the members of the Board in the present case are not entitled to summary judgment on their claim of legislative immunity. Even "stripped of all considerations of intent and motive," the action in substance was not essentially and clearly legislative. Unlike the ordinance in *Bogan*, the resolution proposed by Osborn and adopted by the Board to not renew Canary's contract did not "b[ear] all the hallmarks of traditional legislation."

First, despite the fact that the minutes of the Board meeting contain an entry indicating that the challenged action was taken due to "the adverse financial status being faced by the district," the record does not otherwise reflect that the decision was one "implicating the budgetary priorities of the city and the services the city provides to its constituents." On the contrary, the minutes indicate that the Board went into executive session for the specific purpose of "discuss[ing] the employment of public employees." Moreover, the circumstances of the one-hour executive session — which included short visits by some of the individuals under review — suggest that the Board was making personalized assessments of individual employees, not engaging in an impersonal budgetary analysis of various positions. In fact, the minutes explicitly indicate that the recommended resignations, changes in status, and appointments/reappointments constituted "personnel actions." *See Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) ("[E]mployment decisions generally are administrative . . . .").

Second, the resolution did not "involve the termination of a position." There is no indication in the minutes of the meeting that Canary's contract was not renewed because the Board no longer needed or wanted an assistant principal at Portsmouth East. The defendants argue in their appeal that their action was legislative because they "eliminat[ed] all assistant principal positions within the . . . School District . . . ." This argument, however, is questionable in light of the record of the meeting itself. In the "appointment[s]/ reappointment[s]" section, the minutes reflect that two individuals, Michael Flaig and John Hendricks, were either appointed or reappointed to serve as "assistant principals" in the School District for the coming school year.

Finally, unlike in *Bogan*, the record reflects that the alleged action in this case did not have "prospective implications that reach[ed] well beyond the particular occupant of the office." Shortly after Canary's contract expired, the Board created a new "student facilitator" position at Portsmouth East and hired someone other than Canary to fill it. *Cf. Rateree*, 852 F.2d at 950 (noting, in support of a finding that certain budget cuts were indeed legislative in nature, that "the plaintiffs' positions were eliminated altogether and no one was hired to replace them"). Although the defendants contend that such a position did not require administrator-level certification, the duties of these "facilitators," which Osborn described during his deposition, are quite similar to those of an assistant principal.

Thus, the decision at issue did not necessarily have "prospective [budgetary] implications" beyond Canary himself. *See Campana v. City of Greenfield*, 38 F. Supp. 2d

1043, 1049 (E.D. Wis. 1999) (holding that the council members' vote authorizing the city mayor to suspend the city treasurer was not legislative in nature because the action "had no implications for the position of city treasurer in general" and was "focused on the discipline of a particular city employee"). Furthermore, "[a] job is not abolished under circumstances where the appointing authority simply transfers that job's duties to a new employee to perform." *In re Appeal of Woods*, 455 N.E.2d 13, 15 (Ohio Ct. App. 1982).

III. CONCLUSION

For all of the reasons set forth above, the Board members failed to carry their burden of establishing that they were entitled to summary judgment on their claim of legislative immunity. We therefore **AFFIRM** the judgment of the district court and **REMAND** the case for further proceedings not inconsistent with this opinion.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED AND FILED SEPTEMBER 30, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. C-1-95-944
C-1-96-253

District Judge Susan J. Dlott

GABE CANARY,

Plaintiff,

v.

H. GARY OSBORN, et al.,

Defendants.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ORDER

This matter comes before the Court to consider the Defendant's Motion for Summary Judgment (Doc. # 22). For the reasons and analysis set forth below, the Defendant's Motion is **DENIED**.

Appendix B

I. BACKGROUND

The Plaintiff, Gabe Canary, was employed as an assistant principal by the Portsmouth City School District ("the School District") from 1985 until June 30, 1994. (Doc. #29, Plaint. Aff. ¶ 2). Plaintiff served as Assistant Principal at McKinley Middle School for the 1992 school year. He was the Assistant Principal at Portsmouth East High School during the 1993 school year. (Doc. # 23, Def. Osborn Aff. ¶ 2).

The Defendants in this case are H. Gary Osborn, the Portsmouth City School District Board of Education ("the Board"), Otto F. Apel III, Steve Sturgill, Robert L. Stevens, Phyllis Fuller, and Walter Hickman, Jr. At the relevant times in this case, Osborn was the Superintendent of the School District. Apel, Sturgill, Stevens, Fuller, and Hickman comprised the members of the Board at the relevant times in this case.

In November of 1992 during his tenure as Assistant Principal at McKinley Middle School, Plaintiff attended a meeting with other School District Administrators at Portsmouth High School. At this meeting, the participants discussed ways to increase students' scores on standardized achievement tests. One administrator proposed a strategy whereby School District principals would have access to actual tests and answers and would review these with the teachers in their respective schools. The teachers would then provide the actual test questions and/or answers to students. The Plaintiff opposed this plan on the grounds that it constituted cheating in violating of Ohio Revised Code

§ 3319.151[1] and could result in the suspension of the teaching certificates of participating teachers. (Complaint ¶ 5; Doc. # 29, Plaint. Aff. ¶ 4, 5).

In March 1993, Plaintiff sent a letter to Roger Trent, Superintendent of the Ohio Department of Education, stating that the proposed cheating actually had occurred on the

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1. Ohio Revised Code § 3319.151 provides:

> (A) No person shall reveal to any student any specific question that the person knows is part of a test to be administered under section 3301.0711 [3301.07.11] of the Revised Code or in any other way assist a pupil to cheat on such a test.
>
> (B) On a finding by the state board of education, after investigation, that a school employee who holds a license issued under sections 3319.22 to 3319.31 of the Revised Code has violated division (A) of this section, the license of such teacher shall be suspended for one year. Prior to commencing an investigation, the board shall give the teacher notice of the allegation and an opportunity to respond and present a defense.
>
> (C) (1) Violation of division (A) of this section is grounds for termination of employment of a nonteaching employee under division (C) of section 3319.081 or section 124.34 of the Revised Code.
>
> (2) Violation of division (A) of this section is grounds for termination of a teacher contract under section 3319.16 of the Revised Code.

Comprehensive Test of Basic Skills ("CBTS") and expressing his objections to it. In this letter Plaintiff indicated that Michael Welton, the principal at McKinley at that time, also opposed the proposed scheme. Plaintiff stated that he felt "certain that an investigation will reveal a conspiracy to cheat that includes 'top personnel' and possibly board members." (Doc. #29, Plaint. Aff. ¶ 11, Ex. 1).

On March 31, 1993, Trent wrote a letter to Defendant Osborn stating that the Ohio Department of Education ("Department of Education") had received allegations of possible test security violations involving the use of copies of CBTS preview materials at Wilson Elementary School and other schools in the Portsmouth School District. Trent requested that the School District conduct an investigation of the allegations and notify the Department of Education in writing of the findings and of any action taken. (Osborn Dep., Ex. 4).

The School District retained attorney Richard Ross to investigate the allegations of test security violations and write a report on his findings. (Doc. #30, Ex. 1, Ross Aff. ¶ 2). Based on this investigation and report, the Department of Education concluded that there was no concrete evidence that anyone used test materials to reveal specific test questions to a student or to help a student cheat as prohibited by Ohio Revised Code § 3319.151. Specifically, the Department of Education determined that the School District avoided such a circumstance by replacing the test that teachers may have revealed to students, prior to the scheduled test administration in the spring of 1993. (Doc. # 30, Ross Aff. ¶ 3; Osborn Dep., Ex. 5).

Appendix B

William Shaw, an attorney representing Michael Osborne, the principal of Wilson Elementary School, obtained Canary's March 1993 letter to Trent pursuant to the Ohio Public Records Act. In June 1993, Shaw complained to Gary Osborn and Richard Ross that Michael Osborne was being punished for creating the testing controversy that led to negative publicity and the state investigation when it appeared that Canary's letter had set the state investigation in motion. (Doc. # 29, Shaw Aff. ¶ 3, 4). Defendant Osborn then notified other administrators and the School Board of Canary's letter to Trent. (Osborn Depo. 86, Jones Depo. 22-23).

The Plaintiff's administrative contract expired in March 1994. At a March 10, 1994 School Board meeting, Defendant Osborn, the school superintendent, recommended that the School Board not renew Canary's administrative contract. Osborn also recommended the non-renewal of the administrative contracts of Michael Welton, Michael Osborne, and one other administrator. (Doc. # 23, Def. Osborn Aff. ¶ 2). The Board approved the non-renewal of the administrative contracts of Canary and the other three administrators. (Doc. # 23, Def. Osborn Aff. ¶ 2). Attorney Richard Ross was present at the Board's executive session that evening when the Board discussed the renewal of contracts. (Osborn Depo., Ex. 22).

Prior to the School Board meeting, on March 7, 1994, David Latanick, an attorney representing Canary and Welton at the time, wrote to Ross indicating that any adverse action by the Board against his clients would be retaliatory and in violation of their rights under the First Amendment. (Doc.

29, Ex. 2). In addition, Michael Welton appeared before the Board at the March 10, 1994 meeting to contest his non-renewal. At that time, Welton expressed his belief that Osborn and the Board were retaliating against him and Canary because of their opposition to the cheating scheme. (Doc. # 29, Welton Aff. ¶ 9).

At some point after the March 1994 Board meeting, the School District created two new "facilitator" positions for the 1994 school year. (Osborn Depo. 138-39). Facilitators worked pursuant to teacher contracts and were responsible for student discipline, student proficiency and testing, and general guidance and counseling of students. Defendant Osborn appointed Jim Smith, a teacher in the District as facilitator of Portsmouth East High School. (Osborn Depo. 138).

For the 1994 school year, the School District continued to employ Canary under a teaching contract. (Doc. # 23, Def. Osborn Aff. ¶ 7). Plaintiff contacted Defendant Osborn during the summer of 1994 and told Osborn that his doctor advised that he not take a position that required standing or walking for more than 30 minutes because of a foot injury. Plaintiff requested a "desk job" but Osborn indicated that no jobs other than teaching positions were available. (Doc. # 29, Plaint. Aff. ¶ 20). Plaintiff went on sick leave from the beginning of the 1994 school year until mid-February when his benefits expired. He had no income for the remainder of the school year. (Doc. # 29, Plaint. Aff. ¶ 21).

On October 24, 1995, the Plaintiff filed a Complaint (Doc. # 1) against the Defendant Osborn under 42 U.S.C.

§ 1983. The Complaint alleges that the Defendant refused to renew the Plaintiff's administrative contract in retaliation for his opposition to the cheating scheme, thereby violating his First Amendment right to speak out about a matter of public concern. On May 16, 1996, the Plaintiff filed an Amended Complaint to add the School Board and Board members as defendants. On June 19, 1997, Plaintiff filed a Second Amended Complaint to add a claim for handicap discrimination in violation of Ohio Revised Code § 4112.02(A).

Defendants filed a Motion for Summary Judgment on May 15, 1998. In their motion, the Defendants argue that summary judgment in their favor is appropriate because there is no evidence that Plaintiff's opposition to the cheating scheme was a motivating factor behind the decision not to renew the Plaintiff's administrative contract. The Defendants also assert that the individual Board Members are entitled to absolute immunity from liability because they were acting in a legislative capacity when they voted not to renew the Plaintiff's administrative contract. Finally, the Defendants argue that Plaintiff has not provided sufficient evidence that he was handicapped under Ohio law or that Defendants took any adverse employment action against him as a result of his handicap.

II. THE SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party

is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgment, the movant has the burden of showing that there exists no genuine issue of material fact, and the evidence, together with all inferences that can permissibly be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment is not appropriate if the dispute about a material fact is genuine: "that is, if the evidence is such that reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law). *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). ("In other words, the movant could challenge the opposing party to 'put up or shut up' on a critical issue. After being afforded sufficient time for discovery, . . . if the [nonmoving party] did not 'put up,' summary judgment [is] proper.") On those issues for which it shoulders the burden of proof, the moving party must make a showing that is "sufficient for the court to hold that no reasonable trier of

fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984)) (emphasis omitted.)

For those issues where the moving party will *not* have the burden of proof at trial, the movant must "point[ ] out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The non-moving party then must make a showing sufficient to establish a genuine dispute of fact with respect to that element. *Id.* This showing must amount to more than pointing once again to the pleadings — the movant " 'must set forth specific facts showing that there is a genuine issue for trial.' " *Anderson*, 477 U.S. at 248 (quoting *First Nat'l. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)). Thus, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

III. ANALYSIS

A. Section 1983 Claim

Title 42, United States Code, Section 1983 provides, in pertinent part:

> Every person who, under color of [law] subjects, or causes to be subjected, any . . . person within the jurisdiction [of the United States] to the

> deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party *injured in action at law or suit in equity* . . . .

Thus, to recover under Section 1983, the Plaintiff must demonstrate that the Defendants violated a right guaranteed by the Constitution or federal statute. *See Huron Valley Hospital, Inc. v. City of Pontiac*, 887 F.2d 710, 714 (6th Cir. 1989).

Canary claims that the Board's decision not to renew his administrative contract constituted unconstitutional retaliation against him for exercising his First Amendment right to speak out on a matter of public concern. Canary contends that Osborn and the Board retaliated against him for his opposition to the cheating scheme and his complaint to the Ohio Board of Education.

Retaliation for the exercise of one's constitutional right to speak out on matters of public concern constitutes a First Amendment violation. See, e.g., *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Zilich v. Longo*, 34 F.3d 359, 364 (6th Cir. 1994) ("Retaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment."). When the claim is brought by a public employee, the determination of whether the plaintiff has suffered a constitutional deprivation requires a two-step process. *See Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 144 (6th Cir. 1997); *Rahn v. Drake Center, Inc.*, 31 F.3d 407, 411 (6th Cir. 1994). First, the employee must establish that the speech was constitutionally protected. *See Bailey*, 106 F.3d at 144; *Rahn*, 31 F.3d at 411.

Speech is protected in this context if it addresses a matter of public concern, and if the employee's interest in making such statements outweighs the state's interest as an employer in providing efficient public services. Second, if the plaintiff can demonstrate that the speech is protected, the plaintiff has the burden of showing that the speech was a "substantial" or "motivating" factor in the employer's decision. *See Mt. Healthy*, 429 U.S. at 287. If the plaintiff can meet this burden, the burden shifts to the defendant to show that it would have reached the same decision even in the absence of the protected activity. *Id.*

1. Evidence of Motivation

The Defendants do not dispute that Plaintiff's opposition to the test achievement preparation and his letter to the Ohio Board of Education are protected speech. Rather, the Defendants contend that Plaintiff does not have sufficient evidence that his opposition to the achievement test preparation was a motivating factor in any employment decision made by the Defendants.

The Plaintiff has sued the Defendants in their official and individual capacities. Personal-capacity suits seek to impose personal liability upon a government officer for actions taken under color of state law, whereas official-capacity suits against an officer are generally treated as suits against the governmental entity of which the officer is an agent. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Id.* (quoting *Monell v. New York City Dept. of*

Soc. Serv., 436 U.S. 658, 690 n.55 (1978)). Therefore, the Plaintiff's claims against the individual Defendants in their official capacities merely operate as one claim against the Board as a unit of local government.

In order to prevail on his § 1983 claim against the Defendants in their official capacities, Canary must show that the Board members themselves retaliated against him in their decision not to renew his contract. The liability of a local unit of government such as the Board cannot rest upon the doctrine of respondeat superior. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (citing *Monell*, 436 U.S. at 694-695). A municipality may be held liable under § 1983 only for official policies or customs which are adopted by officials with final decision making authority. *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). The question of final policy making authority is one of state law, and Ohio law states that a board of education has final authority to establish employment policy and make contract renewal and non-renewal decisions. *See Hull v. Cuyahoga Valley Joint Vocations Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 515 (6th Cir. 1991); *Justus v. Brown*, 42 Ohio St.2d 53 (1975). The Plaintiff, therefore, must show a direct causal link between the acts of the Board and the alleged constitutional deprivation. *See Canton* at 385.

The Court finds Plaintiff has provided sufficient evidence that there was a direct connection between his protected activity and the Board's decision not to renew his contract to withstand the Defendants' Motion for Summary Judgment. "Usually, the question of causation is a factual

issue to be resolved by a jury, and may be satisfied by circumstantial evidence." *Hartsel v. Keys*, 87 F.3d 795, 803 (6th Cir. 1996) (citations omitted). The Plaintiff's evidence of motive in this case is mostly circumstantial. In retaliation cases, however, where the ultimate issue is the defendant's intent, it is rare that a decision-maker will admit to retaliating and it is impossible to get inside the decision-maker's mind. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness testimony' as to the employer's mental processes.").

Viewing the evidence in a light most favorable to the Plaintiff, the non-moving party, a reasonable jury could find that the Plaintiff's protected conduct motivated the Board's decision not to renew his contract. In the fall of 1992, Canary voiced his opposition in the District's proposed test achievement preparation procedures. In March 1993, he followed up this complaint with a letter to Ohio Board of Education. Canary's letter prompted an official investigation of the District's testing procedures by the Department of Education which created adverse publicity for the District. Plaintiff has produced evidence that Michael Osborne's attorney, William Shaw informed Defendant Osborn of Canary's letter to the Department of Education. Plaintiff presented the affidavit of Shaw who states that when he complained to Osborn and Ross, the School Board's attorney, that his client was being unfairly singled out for punishment, Ross stated that "they would take care of Canary." According to Shaw, Defendant Osborn nodded as if in agreement. (Doc. # 29, Shaw Aff. ¶ 5). Defendant Osborn subsequently notified the Board of Canary's letter to the Department of Education.

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The Defendants argue that Ross' statement, even if true, is inadmissible hearsay. Federal Rule of Evidence 801(d)(2)(D) provides that a statement by a party opponent is not hearsay if it is offered against a party and is a statement by the party's agent concerning a matter within the scope of the agency or employment. Defendants argue that Ross was not acting within the scope of his employment with the School District when he made the alleged statement. The statement, however, is clearly admissible as an adoptive admission under Federal Rule of Evidence 801(d)(2)(B). Rule 801(d)(2)(B) permits a court to allow into evidence a statement as non-hearsay if "[t]he statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth." Adoption can be manifested "by any appropriate means, such as language, conduct or silence . . . ." *United States v. Jinadu*, 98 F.3d 239, 244 (6th Cir. 1996). Defendant Osborn's alleged nod indicates an acquiescence to Ross' statement and the statement is therefore admissible as an adoptive admission.

In March 1994, Canary's administrative contract, as well as the contracts of several administrators, expired. From the pool of contracts up for renewal, the Board reduced the number of overall administrators by voting to not renew four contracts at a meeting on March 10, 1994. Canary's contract, along with the contracts of Michael Welton and Michael Osborne, were three of the contracts the Board chose not to renew. Each of these individuals was somehow connected to creating the "testing controversy."

Furthermore, the Board was aware that Canary and Welton believed Defendant Osborn's recommendations not

to renew their contracts were retaliatory in nature. David Latanick, Plaintiff's attorney, communicated his allegations of retaliation to the Board's attorney, Ross, three days before the Board took action. On the night of the Board meeting Welton personally told the members that Osborn's recommendations were based on retaliatory animus. Plaintiff has presented evidence that no Board member asked questions of Welton or responded in any way to his allegation. (Doc. # 29, Welton Aff. ¶ 9). A reasonable jury could determine from these circumstances that there was a direct connection between the protected activity and the decision not to renew the Plaintiff's contract.

In addition, a reasonable jury could find that the Defendants would not have taken the same action in the absence of the Plaintiff's protected activity. Defendants argue that because of a financial crisis in the District, all assistant principal positions were eliminated and the decision not to renew the Plaintiff's contract was solely financial. The minutes of the Board meeting reflect, however, that the Board voted to approve two one-year contracts for two other administrators as assistant principals for the 1994 school year. (Osborn Depo, Ex. 22). Defendant points out that neither of these administrators served in assistant principal positions the next year and were instead assigned to other administrative positions. On the night the Board made its decision not to renew Plaintiff's contract, however, it did not vote to eliminate the assistant principal position. Rather, the Board voted on which particular administrative contracts to renew. A reasonable jury could find that although the District faced a financial crisis and the Board reduced the number of administrators overall, the Board did not renew

Plaintiff's contract, as opposed to other administrators' contracts, because of his protected conduct. The determination of the Board's motive in not renewing Plaintiff's contract, therefore, should be left to the jury.

2. Immunity Claim

Defendants contend that neither Osborn or the Board members are liable in their individual capacities. In arguing that Osborn is not liable in his individual capacity, the Defendants state that the Plaintiff has presented insufficient evidence that Osborn's recommendation to the Board not to renew Plaintiff's contract was the result of unlawful motivation. The evidence the Court has detailed above, however, is sufficient evidence of Osborn's motive for Plaintiff to survive summary judgment.

Defendants then argue that the Board members are not liable in their individual capacities because their decision not to renew Plaintiff's contract was legislative activity and as such they are entitled to absolute immunity from civil liability under § 1983. Defendants cite the recent decision by the United States Supreme Court in *Bogan v. Scott-Harris*, __ U.S. __, 118 S. Ct. 966 (1998) to support their argument for absolute immunity. In that case, the respondent employee filed suit under § 1983 against the mayor and city council of Fall River, Massachusetts alleging that the elimination of the city department in which she was the sole employee was motivated by racial animus and retaliation for her exercise of her First Amendment rights. *See id.* at 969. The Court held that the mayor's introduction of a budget, the city council's passage of an ordinance eliminating the

respondent's position, and the mayor's signing the ordinance into law constituted legislative acts entitling the mayor and city council to absolute immunity. *See id.* at 973. The Court emphasized the functional analysis of legislative immunity, focusing on the nature of the action taken by the mayor and city council. *See id.* The *Bogan* Court noted that the ordinance reflected a "discretionary, policy making decision implicating the budgetary priorities of the city and the services the city provides to its constituents." *Id.* The Court also stated that the ordinance "involved the termination of a position, which unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office." *Id.*

The Defendants in the present case argue that the Board members were similarly performing legislative functions in deciding to non-renew Canary's administrative contract in response to the financial problems facing the School District. The Defendants argue that the School Board action involved the termination of the assistant principal position which implicated the budgetary priorities of the School District and the services it provided to its students. As noted above, however, the minutes of the Board meeting reflect that the Board voted to approve two one-year contracts for two administrators as assistant principals for the 1994 school year. Therefore, the night that Board voted to not renew Plaintiff's contract, it did not vote on the elimination of a position or department, as in *Bogan*. Rather, in not renewing particular employees' contracts while renewing others, the Board was making individual employment decisions. Such decisions are administrative in nature, *see Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987), and therefore legislative immunity does not attach to the Board members.

Appendix B

B. Disability Discrimination

Defendants assert that Canary has failed to produce evidence that he is or was handicapped under Ohio Revised Code § 4112. Defendants further state that Canary has not produced evidence that the Defendants took any adverse employment action against him as a result of his handicap or otherwise. Finally, Defendants argue that the record establishes that the School District offered reasonable accommodations to Plaintiff and he refused them.

Handicap discrimination in employment situations is prohibited by Ohio Revised Code § 4112.02(A). In order to establish a prima facie case of handicap discrimination under Ohio Revised Code § 4112, the person seeking relief must demonstrate:

(1) that he or she was handicapped

(2) that an adverse employment action was taken by an employer, at least in part, because the individual was handicapped, and

(3) that the person, though handicapped, can safely and substantially perform the essential functions of the job in question.

Hood v. Diamond Products, Inc., 74 Ohio St. 3d 298, 302 (1996).

Ohio Revised Code § 4112(A)(13) defines "handicap" as:

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> ". . . a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment."

The Court finds that Plaintiff has adduced sufficient evidence that he was handicapped within this definition to raise issues of material fact to survive summary judgment. Plaintiff's affidavit states that he had permanent scarring on his feet that prevented him from walking or standing for long periods of time. He also states that he taught for two years prior to joining the Portsmouth School District and had to stop because of his foot condition. (Doc. # 29, Plain. Aff. ¶ 19).

Plaintiff also states in his affidavit that he has a record of an impairment because the Ohio Bureau of Workers' Compensation declared him to have a permanent partial disability. Plaintiff, however, offers no evidence of this determination other than his own hearsay assertion. Therefore, the Court will not consider any determination by the Ohio Bureau of Workers' Compensation as evidence of Plaintiff's handicap. Similarly, Plaintiff asserts that his doctor advised him against taking a teaching position but offers no admissible evidence of this medical advice. The Court also does not consider this statement in its determination of Defendants' Motion for Summary Judgment.

In *Hood*, the Ohio Supreme Court held that while it is better practice to submit expert testimony to prove the

existence of a handicap under Ohio Revised Code § 4112, such testimony is not required. *See* 74 Ohio St. 3d 298, 303-304. The *Hood* Court found that the plaintiff's testimony regarding her ailment and the defendant's knowledge of her treatment were sufficient evidence of handicap to survive summary judgment. *See Hood* at 304. In the present case, Canary has produced evidence that he had a chronic foot problem that interfered with the major life activity of walking and standing, and that he informed his employer of his condition. Defendant asserts that the administrator job formerly held by Plaintiff required more walking than a teaching position. Plaintiff, however, disputes this fact. In addition, Defendant argues that Plaintiff's foot condition could not have substantially impaired his walking since he applied for a job as a football coach. This argument goes to the weight and credibility of Canary's testimony which should be determined by a trier of fact.

Furthermore, Plaintiff has produced sufficient evidence that the Defendants took adverse action against him as a result of his handicap to survive the Motion for Summary Judgment. Plaintiff asserts that he informed Defendant Osborn of his condition and he requested a desk job that did not require as much walking and standing as a teaching position. He further contends that the Defendants refused to consider him for any such job and that he was forced to take sick leave as a result. The School District assigned Plaintiff to a tutoring position that required less standing and walking for the 1995 school year only after Plaintiff filed a charge with the Equal Employment Opportunity Commission.

Ohio courts have noted that a civil rights charge can arise from the hiring as well as the termination process. *See*

Cseipes v. Cleveland Catholic Diocese, 109 Ohio App.3d 533 (1996) (finding that teacher's non-renewal constituted adverse action). Failure to consider a handicap employee for other jobs for which he is qualified and could perform despite his physical limitations also qualifies as adverse action. *See Wooten v. City of Columbus*, 91 Ohio App. 3d 326, 332 (1993) ("[T]he evidence, viewed most favorably to plaintiff . . . reveals a genuine issue of material fact as to whether the city's actions were taken for a nondiscriminatory reason. No accommodation was offered to plaintiff in connection with the position he held or any other position he could perform."). Defendants argue that Canary was not forced to take sick leave because the School District offered reasonable accommodations in his teaching position such as the use of a stool and desk. Plaintiff, however, disputes that Defendants offered any such accommodations. The evidence, viewed most favorably to the Plaintiff, reveals a genuine issue of material fact as to whether the Defendants' actions were taken for nondiscriminatory reasons.

IV. CONCLUSION

For the foregoing reasons, the Defendants' Motion for Summary Judgment with respect to the Plaintiff's § 1983 claim and Plaintiff's handicap discrimination claim under Ohio Revised Code § 4112.02(A) is **DENIED**.

IT IS SO ORDERED.

s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-95-944
C-1-96-253

District Judge Susan J. Dlott

GABE CANARY,

Plaintiff(s)

v.

H. GARY OSBORN, et al.,

Defendant(s)

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

. . . Accordingly, the Defendants' Motion for Summary Judgment with respect to the Plaintiff's Sec 1983 claim and

Appendix B

Plaintiff's handicap discrimination claim under Ohio Revised code Sec 4112.02(A) is DENIED.

September 30, 1998 Kenneth Murphy, Clerk

s/ Vicki Penley
Vicki Penley
Deputy Clerk

APPENDIX C — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 6[1]

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or the person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
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No. 00-176

In The

Supreme Court of the United States

OTT F. APPEL, III, PHYLLIS FULLER, ROBERT STEVENS, STEVE STUGIL and WALTER HICKMAN, JR.,

Petitioners,

v.

GABE CANARY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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7PP

QUESTION PRESENTED

Whether the Court of Appeals properly determined that legislative immunity did not apply to Petitioners' employment decision not to renew Respondent's administrative contract?

REASONS FOR DENYING THE WRIT

The decision of the Sixth Circuit is consistent with this Court's opinion in *Bogan v. Scott-Harriss*, 523 U.S. 44 (1998). The Sixth Circuit carefully reviewed the factual background of this case and correctly distinguished it from *Bogan*. Unlike *Bogan*, this case involved an employment decision not to renew the administrative contract of an assistant principal. The entire class of jobs was not eliminated and there was no prospective or far-reaching effect on anyone except the respondent, Mr. Canary. The Sixth Circuit's opinion does not depart from settled principles. There is not a conflict among the circuits that needs to be resolved.

In addition, this is not a case of great public importance. Petitioners speculate about a chilling effect on the willingness of citizens to serve on school boards. Yet, the Sixth Circuit's opinion is in accord with prior decisions limiting the application of legislative immunity to legislative functions. School Board members engaging in true legislative activity retain immunity. Further, school board members who make personnel decisions still retain the qualified immunity defense available to them under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny.

1. The Sixth Circuit's Opinion Is Consistent With This Court's Decision In *Bogan v. Scott-Harriss*

Petitioners assert they are entitled to legislative immunity and that the decision of the Sixth Circuit conflicts with this Court's decision in *Bogan v. Scott-Harriss*, 523 U.S. 44 (1998). In *Bogan*, the Court held that local

legislators have absolute immunity for legitimate legislative activity. As the Sixth Circuit found, this case presents a situation very different from that which the Court reviewed in *Bogan*.

First, the Sixth Circuit correctly determined that, unlike what happened in *Bogan*, the decision to nonrenew Respondent's contract was simply an administrative employment decision. As observed by the Sixth Circuit, the minutes of the Board meeting reflect that these decisions were made under the heading "personnel actions". *Canary v. Osborn, et al.*, 211 F.3d 324, 330 (6th Cir. 2000). The decision was made in executive session to "discuss the employment of public employees." *Id.* at 326. The Sixth Circuit properly found that Board was making personalized assessments of individual employees rather than an impersonal budgetary analysis of various positions. *Id.* at 330.

Second, the Sixth Circuit appropriately noted that, unlike *Bogan*, the decision at issue did not "involve the termination of a position." *Id.* at 330. In *Bogan*, there was a vote to eliminate the Department of Human Services. Scott-Harriss, the employee who headed the department, was terminated. The decision had far-reaching and prospective application that went beyond her termination. *Bogan*, 523 U.S. at 55-56. Human services were no longer provided to city residents.

Our case is easily distinguishable. Petitioners did not vote on a legislative proposal to eliminate all assistant principal positions. They simply agreed not to renew Respondent's assistant principal contract. Rather than implicating the budgetary priorities of the school district

and the services it provides to its residents, the decision not to offer Respondent a contract amounted solely to the "firing of a particular employee." *Bogan*, 523 U.S. at 55-56. This was an administrative employment decision, not a legislative act.

While Petitioners assert that there were no assistant principals by the beginning of the 1994-1995 school year, there is no evidence in the record of any legislative action by them to accomplish that result. Instead, as the Sixth Circuit recognized, Petitioners' March 10, 1994 vote did not eliminate all assistant principals. In fact, two assistant principals were awarded new assistant principal contracts for the 1994-1995 school year. *Canary*, supra, at 330-31. The only assistant principal affected by the vote was Respondent. *Id.*

Finally, unlike *Bogan* where the employee was not replaced and there was no argument that she was, the Sixth Circuit recognized that Respondent's duties were arguably assumed by another employee under a different title in a newly created position. *Id.* An employment decision was made to give another employee the new position instead of Respondent. That decision had no effect on the public at large or the services provided by the Board or School District. There was no legislative activity. Under Ohio law, a job is not abolished when the appointing authority simply transfers that job's duties to a new employee and gives the job a new title. *In re Appeal of Woods*, 7 Ohio App. 3d 226, 228 (1982).

2. The Sixth Circuit's Opinion Will Have Neither A Chilling Effect On Individuals Nor A Debilitating Effect On School Districts

Petitioners argue that the decision of the Sixth Circuit will discourage citizens from becoming school board members. Not so.

The decision of the Sixth Circuit did not change the law. Legislators remain immune from suit for true legislative activity. School board members who engage in legitimate legislative activity retain absolute legislative immunity. Petitioners did not legislate. They went into a private and closed executive session to discuss personnel matters and employment decisions.

In addition, Petitioners fail to recognize that even without legislative immunity, individuals remain protected by qualified immunity for decisions that do not violate clearly established constitutional rights. See *Harlow v. Fitgerald*, 457 U.S. 800 (1982).

CONCLUSION

The mere fact that Petitioners voted to approve a recommendation denying Respondent an assistant principal contract does not make their conduct legislative. *Bogan* does not hold that legislative immunity attaches to individual employment decisions. *Bogan* limits legislative immunity to legitimate legislative activity. As the Sixth Circuit correctly determined, there was none in this case.

The petition for certiorari should be denied.

Respectfully submitted,

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